

“In Europe There Is No Solidarity in Terms of the Asylum System”

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The Lampedusa catastrophe has once more brought the asylum system in the European Union to public attention. But despite all the official consternation displayed by the various European interior ministers, they show little inclination to get at the root of the problem. What is your impression of the political reaction?

My primary impression is that a continuation of the policy hitherto is being recommended – in other words: “More of the same!” They still want to police the external borders. This had already been defined as a political goal of the European Union, as well as the intensified cooperation among the member-states, and with help of the border-protection agency Frontex. Insofar I have not heard anything new. The fundamental problems of European refugee policy are still not being tackled.

And what would these be?

There is a great tension between the fundamental right to asylum in Europe and access to this right. The right to asylum in [Article 18 of the Fundamental Rights Charter](#) is an ambitious promise, and the range of persons in need of protection is very widely defined in the so-called [qualification guidelines](#). For example the EU has a more liberal definition of what a refugee is than did the Federal Republic of Germany before Europeanization of the asylum law. On the other hand there are hardly any sound legal possibilities for refugees to argue their case for asylum. They are kept at such arm’s length that they sometimes don’t even apply for asylum – even if they have a right to it. Access to the asylum procedure is used as a control system. The European Union’s policy oscillates between these two poles – on the one hand, a liberal self-conception and the belief in a right to asylum; on the other, an intensification of controls on the external frontiers and a policy that seems intent on hindering a person’s access to asylum through cooperation with the EU’s peripheral states.

Does the EU allow itself to make so many promises with respect to the right to asylum because it makes access to this right so difficult?

In any event it does both of these simultaneously. I don’t see any kind of linear causality, because there are also international standards that limit the EU’s scope of action. But the result is that certain aspects of European refugee law contradict each other.

What has to be done to diminish this tension?

An important goal would be to loosen up the visa regime so that people from their countries of origin and transit could legally enter states of the European Union and apply for asylum, which in turn would ensure that their application is assessed in a fair process and it be judged whether this certain person actually requires protection. Because there is, practically speaking, no sure and legal access to asylum procedure in the European Union; in their desperation people feel compelled to undertake degrading and dangerous voyages across the Mediterranean. If they survive the crossing, without their craft sinking, they are legalized and the European Union says: Your asylum procedure will be carried forward regardless of whether you have entered illegally or not. During the procedure the refugees then have the right to public assistance and accommodation. But to this point we try to keep them at arm’s length.

What now?

The EU should work systematically on a second channel for people to access asylum while also introducing resettlement programs – that is, admitting contingents of refugees who already find themselves outside the borders of the persecutory state and who have been provisionally admitted by a third state. In the case of Syria, for instance, that would be those refugees registered in Jordan. Such people, who have neither any prospect of returning to their homeland nor of being integrated into the transit state, should be collectively taken up by the European Union, thereby erecting a second pillar of the European asylum system.

The debate would presently appear to be mainly a conflict over the distribution of these refugees among the various EU member-states. Should the EU become active at the legislative level and more strongly centralize the system?

The refugee law is now among the most Europeanized spheres in migration law. The question as to which EU member-state is responsible for carrying out the asylum procedure is detailed in the so-called [Dublin Regulation](#). The crux of the problem is therefore not that there exists no European mechanism but that this is problematically structured from a substantive point of view. It is in this area that EU law has been infiltrated, as it were, by criteria that stem from that period of loose international cooperation and which rest on the basic idea that the responsible state should be primarily determined by where the refugees first land. This system obviously disadvantages those member-states on the European Union's eastern and southern periphery. But whenever changes to the system are proposed, they are met with hefty resistance by the states in northern and western Europe. We once more have a remarkable situation and a contradiction – on the one hand the central regulation of the respective responsibility of EU states, and on the other there is absolutely no solidarity mechanism which might compensate for the unequal burdens that this regulation spawns. In the European treaties it is [expressly](#) mentioned that there must be solidarity among the EU member-states in terms of burden-sharing – but this organizational task has not yet been implemented. There is no asylum system based on solidarity.

Then how is this solidarity to develop and what form would it eventually take?

In my view an important linchpin would be financial solidarity. The burdens of care that accompany any asylum procedure should be fully financed by the EU. In this way those first host countries would be relieved of some of the inevitable financial pressure that goes along with admitting refugees.

Mustn't those countries farther to Europe's north also play a larger role when it comes to petitioners for asylum?

It's not so much the problem that the first host countries – that is, the peripheral states – are primarily responsible for carrying out the asylum procedure. One cannot speak of any real solidarity among the member-states when it is implicitly co-decided that those on the European Union's eastern and southern periphery should be responsible for permanently taking on the refugees. A main shortcoming of the EU's refugee policy is that those eventually granted asylum have no European-wide asylum status – that is, they have no automatic right to cross their host nation's borders into other EU nations. We have uniform criteria as to just who qualifies as a refugee, but the legal status enjoyed by such a refugee is the purview of each separate member-state. Above all, the refugee has no right to economic freedom of movement. There is a right to travel in the Schengen area, which is of a temporary nature, but those with official refugee status may not settle in the country of their choice. This is only possible after five years and an official change of status. Herein lies a key point that can promote solidarity within the Dublin system – if someone acquires refugee status in a certain country, this should no longer imply that he must then remain in this country. If the initial host countries knew that they might well be providing only temporary protection for someone, then they would certainly be more willing to carry out the validation process in service of all member-states.

So a status as refugee that allows for EU-wide movement?

Yes. The treaties [mandate](#) formulation of a definition as to just what constitutes official European asylum status, but the matter has still not really been regulated. Another aspect that any such European asylum status should take into

account, along with freedom of movement within the EU as a whole, is that of social rights. We have once more the remarkable situation in which official refugees are sometimes treated more poorly, from a social-law standpoint, than are petitioners for asylum. For instance in Italy there is duty of care for all asylum seekers by virtue of European law, but as soon as an individual has been granted official refugee status they often end up being homeless.

In Germany the burden is distributed in terms of the size and economic power of the respective Länder. Daniel Thym has proposed doing something similar at the European-wide level. What do you think of the idea?

I'm rather skeptical about distributing asylum seekers among all the EU member-states. How would a plan like that be implemented? In Germany such an allocation formula would run into difficulties of a practical nature. The quotas agreed to under the Königstein Agreement, on which Daniel Thym is basing his proposal, are not primarily concerned with the place where the asylum procedure is carried out. The question as to whether the asylum seeker is in need of protection should in fact be clarified as quickly as possible in that place where he has made initial entry. All those involved have an interest in speeding the asylum procedure along as quickly as possible without having to undertake a protracted resettlement process from Malta to Estonia.

Would that kind of formula be essential for the long-term assimilation of a refugee?

That is a conceivable model, a kind of internal EU-resettlement of officially recognized refugees. But my preferred method would be to completely forego any planned-economy supervision of the process and to instead simply afford the refugees freedom of movement. I trust that it would have a disburdening effect insofar as a significant portion of the refugees would eventually leave behind the initial host states and gravitate to those economically stronger regions where they would then have nodal points in the form of jobs or ethnic communities. If that is not politically doable, one could then give some thought to a type of Königstein quota for refugees.

But in certain countries such as Greece the integration process has been disastrous . . .

There are a considerable number of practical obstacles to be overcome – that's quite clear. Italy or Greece do not fully implement EU legal provisions – or they implement them not at all. I see a connection between effectiveness and solidarity. If the peripheral states were part of a burden-sharing system that took their interests properly into account, then you would have a much more solid basis for them to fully implement the current law. The temporizing resistance of states like Italy, Malta and Greece is also traceable to the fact that they are captive to a system that is weighted to their discernible disadvantage.

What about those persons who have been denied refugee status but who can still not simply be deported?

That's another defect in the European Union's asylum and refugee law. We have no uniform regulations for persons who don't fulfill the criteria for international protection as set down in the EU guidelines but who still have the right not to be deported – for instance because their health will not permit it or there is no state obligated to take them in. There is no single European regulation governing such complementary protection measures. We have to work on this, for in practice there are many individuals who do not qualify for protection in the narrower sense but whose repatriation is impossible for legal or practical reasons.

You mean that there would be a temporary suspension of deportation?

It is desirable that these persons receive a European-defined status that would entail a certain freedom of movement. Presently everything is regulated at the national level; and with regard to this precarious legal status, many countries have some version of what the German state calls *Duldung*, or "tolerance." Other states grant the individuals residency permits of limited duration, while other states have no regulations at all when it comes to this no-man's-land. In some member-states it can lead to highly problematic situations from a human-rights standpoint, the individuals concerned just dwelling in a sort limbo.

How optimistic are you that in the foreseeable future there will in fact be a legal system addressing asylum and migration which is based on more solidarity?

I'm rather sanguine on that count. Refugee law has been Europeanized for the past decade or so, and we have actually come a long way. If we were to speculate as to how the world would look if every EU member-state had its own refugee law then one thing is certain – it would be a far more problematic situation than the one we presently have. For instance, the fact that the initial host states are subject to the same obligations of care for refugees during the asylum procedure, prevents the emergence of a kind of competition to undercut each other in social terms. There are still certainly many deficiencies. But in the past ten years it has become politically inconceivable that asylum policy should be left to the individual states. Everyone is fundamentally in agreement that a General European Asylum System should be created – even if there still remains much political resistance and many conflicts of interest on the road to making it a reality.

Will we achieve this goal in the next two or three years?

Try the next ten. Within that time-frame I'm optimistic.

Maximilian Steinbeis posed the questions; Wiebke Fröhlich transcribed and edited the conversation. Translation: Kevin McAleer.

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